Supreme Court, U.S.
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No. 95-2074

In The

Supreme Court of the United States

October Term, 1995

CITY OF BOERNE, TEXAS,

Petitioner,

versus

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE AT THIS TIME

Petitioner, respondent Flores, amici representing sixteen States, the Texas Municipal League, the International Municipal Lawyers Association, and eight national religious organizations have argued forcefully in favor of granting certiorari in this case. In short, those who sit on opposite sides of the table under the regime of the Religious Freedom Restoration Act ("RFRA") have come together to urge this Court to clarify the prevailing confusion over its constitutionality.

By contrast, the Solicitor General has taken the unwarranted position that certiorari should not be granted on the issue of RFRA's constitutionality. Ignoring the indescribably vast range of circumstances in which RFRA has created uncertainty, which in turn has caused a certain escalation in litigation and settlement costs, the Solicitor General is content to let this unacceptable state of affairs continue into the indefinite future. With all due respect, the Solicitor General's arguments for deferring consideration of RFRA's constitutionality are not persuasive.

A. *Appellate Court Split.* Both the petition[1] and respondent Flores' response easily dispose of the Solicitor General's argument (S.G. at 8) that this Court should

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[1] Pages from the Petition for Writ of Certiorari are cited as P.W.; Respondent Flores' response is cited as F.R.; the Solicitor General's response is cited as S.G.; and the Coalition for the Free Exercise of Religion's Amicus Brief is cited as C.B.

deny certiorari because there is no split in the appellate courts as of yet. An appellate court split is not a jurisdictional requirement but rather a jurisprudential consideration. No salutary purpose is served by waiting for further appellate courts to assess RFRA's constitutionality. P.W. at 10-12; F.R. at 10-12.

B. *Finality.* The Solicitor General's argument that the decision below is "interlocutory in nature" and therefore unworthy of review is wholly without substance. S.G. at 9. As Judge Higginbotham characterized it, the district court entered "a partial final judgment under Fed. R. Civ. P. 54(b). . . . We [the Court of Appeals] have jurisdiction." P.W. at 3. That is more than sufficient for this Court.

Even if the decision below were not final, this Court could exercise jurisdiction over the case if it were so inclined. Supreme Court Rule 10 states: "Review on a writ of certiorari is not a matter of right, but of judicial discretion." A certiorari petition may even be granted when a case is pending in the court of appeals *before* judgment is entered. Sup. Ct. Rule 11.

Robert L. Stern and Eugene Gressman explain as follows: "Although . . . the Court ordinarily declines to exercise its discretionary certiorari jurisdiction to review judgments that are not final, the fact that the decision below lacks finality is no bar to review cases in the courts of appeals. . . . As long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for certiorari is filed, the Supreme Court has jurisdiction to take the case *whatever its status in the lower court.*"

Robert L. Stern & Eugene Gressman, *Supreme Court Practice* 40 (7th ed. 1993) (emphasis added). Given that the decision below was a final judgment on the issue of RFRA's constitutionality, and that a timely petition has been filed, there can be no question that this Court can and should grant certiorari in this case at this time.

C. *Record Below.* The Solicitor General argues that "[g]ranting review on this record would . . . require the Court to address the constitutionality of federal legislation in a wholly abstract context." S.G. at 11. As the arguments for granting certiorari in the petition, respondent Flores' response, and all of the *amici curiae* make absolutely clear, after almost three years in operation, there is nothing abstract about RFRA's impact or its constitutional parameters. Whatever record might be built is irrelevant to RFRA's constitutionality, which is determined solely by this Court's federalism, separation of powers, and Establishment Clause doctrines.

II. RFRA IS PATENTLY UNCONSTITUTIONAL AND THEREFORE SHOULD BE INVALIDATED SOONER RATHER THAN LATER

While a full-blown discussion of the merits is not appropriate at this stage, a brief reply to respondents' arguments on the merits makes clear the necessity of granting certiorari now to relieve state and local governments from RFRA's grasp.[2]

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[2] Amicus Coalition for the Free Exercise of Religion's misguided attempt to link the recent and tragic church bombings in this country with the City's negative determination

A. *Section 5 of the Fourteenth Amendment.* Respondent Flores mistakenly believes that labeling RFRA a "statutory" right rather than a constitutional right saves RFRA. F.R. at 4. Section 5 of the Fourteenth Amendment, the only possible source of constitutional authority for RFRA, does not authorize Congress to devise statutory rights wholly distinct from constitutional rights designated by this Court. To the contrary, the plain language of Section 5 gives Congress power to "enforce, by appropriate legislation, the provisions of *this article.*" P.W. at 38a (emphasis added). In other words, section 5 grants Congress the sole power to enforce *constitutional* guarantees, not the power to transform those guarantees under the guise of "statutory rights."

The Constitution protects religious adherents solely from discriminatory legislation burdening religious conduct. *Employment Division v. Smith,* 494 U.S. 872, 885 (1990). RFRA does not enforce that guarantee, but rather a much different proposition – one far removed from *Smith* and even this Court's pre-*Smith* jurisprudence. *Smith,* 494 U.S. at 885; P.W. at 15. RFRA invents a statutory right out of Congress's policy judgment that the Constitution does not go far enough now and has never

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pursuant to its democratically and legitimately enacted historical preservation rules reveals how crucial it is for this Court to take action at this time. The Coalition's contempt for democratically enacted law starkly reveals the extraordinary burdens RFRA places on elected officials attempting to serve the people. The City has never "deprive[d] the faithful of a house of prayer." C.B. at 8. Instead, it has asked, and failed to receive, cooperation from the Church in preserving its most beautiful and historical district.

gone far enough with respect to religious rights. P.W. at 5-7. Its goal is not to enforce the guarantees announced in *Smith* but rather to supplement them.

Respondents' attempt to shoehorn RFRA into the Voting Rights Act cases is similarly unavailing. F.R. at 19-23; S.G. at 12. The Voting Rights Act cases, which involved the enforcement of guarantees found in the Thirteenth, Fourteenth, and Fifteenth Amendments, are irrelevant. The plain language of the First Amendment, which begins with the phrase, "Congress shall make no law," is in sharp contrast to the expansive language of the Thirteenth Amendment and the more limited language of the Fourteenth and Fifteenth Amendments. Even cursory comparison of the language in the First, Thirteenth, Fourteenth, and Fifteenth Amendments makes crystal clear that Congress is on a considerably shorter leash with respect to First Amendment freedoms than it is with respect to rights against discrimination. As Leonard Levy has stated, "Black magic – not historical evidence, grammatical analysis, or logical deduction – black magic and only that can turn the First Amendment into a repository of government power. Plainly it limits power." Leonard Levy, *The Establishment Clause: Religion and the First Amendment* 115 (1986). *See also Hutto v. Finney*, 437 U.S. 678, 717-18 (1978) (Rehnquist, J., dissenting) ("[I]t is not at all clear to me that . . . Congress has the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially 'incorporated' into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters.")

Even if Congress has some prophylactic power to enforce the Fourteenth Amendment's Equal Protection Clause in situations where the factual record plainly reveals state and local governments recalcitrant to the Constitution's demands, the First Amendment, *by its own terms,* discourages Congress from taking such an activist role with respect to First Amendment freedoms. Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act,* 48 Vand. L. Rev. 1539, 1582, 1595 (1995). The empirical necessity of prophylactic legislation in the Voting Rights Act cases is not duplicated in this circumstance. *See* P.W. at 22. *See also Sasnett v. Sullivan,* No. 95-3924, 1996 WL 432348 *3 (7th Cir. August 2, 1996) ("We are given some pause, . . . by the lack of a recent history of governmental discrimination against religious observance.")

Finally, it is undeniable that RFRA cannot be saved by labeling it after the fact as an anti-discrimination statute. S.G. at 21. RFRA goes considerably further, commanding the courts to employ strict scrutiny to ban substantial burdens on religion, whether discriminatory or not. *The Religious Freedom Restoration Act: Hearings Before the House Comm. on the Jud.,* 102d Cong., 2d Sess. 334-335, 337 (May 13-14, 1992) (emphasis added) (RFRA intended to protect mainstream as well as minority churches). Congress is fully capable of enacting laws banning discrimination against religion when it intends to do so. *See* 42 U.S.C. 2000e-2; *Estate of Thornton v. Caldor,* 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring) (characterizing religious accommodation provisions as "anti-discrimination law" and "not the sort of accommodation statute specifically contemplated by the Free Exercise Clause"). RFRA

itself makes clear its roots lie in the First Amendment and not the Equal Protection Clause. 42 U.S.C. § 2000bb-4.

B. *Separation of Powers.* Both respondents attempt to create the impression that RFRA is a run-of-the-mill congressional enactment that fits comfortably within this Court's jurisprudence. *See* S.G. at 11-13; F.R. at 19-24. To the contrary, RFRA stands in a disreputable class all by itself. As the opinion in *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591, 602 (D. Md. 1996), makes eloquently and abundantly clear, RFRA is an unprecedented grab for power by Congress in derogation of settled separation of powers principles. *See also Hamilton v. Schriro*, 74 F.3d 1545, 1570 (8th Cir. 1996) (McMillian, J., dissenting); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 139 (1996) ("Constitutional interpretation, which necessarily involves development of appropriate judicial standards of review, is at the core of the judicial process. . . . [W]hen Congress intrudes upon this core judicial function, directing the courts to abandon or adopt or restore a particular constitutional interpretation and to follow a standard of judicial review that Congress prefers, the result is a stark violation of the separation of powers doctrine . . . ").

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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